

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRANCES ELIZABETH WHARTON¹

Claimant

V.

CHANCE RIDES, INC.

Respondent

AND

**CONTINENTAL WESTERN INSURANCE
COMPANY**

Insurance Carrier

Docket No. 1,006,012

ORDER

Claimant requested review of the June 27, 2013 post-medical Award. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

E. L. Lee Kinch of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the post award record.

ISSUES

Claimant's request for post award medical treatment was denied because she failed to prove her current need for medical treatment was causally related to her 2002 injury.

Claimant requests reversal. She argued at the post-award hearing that she had no additional acute traumatic injuries and her back after her 2002 injury and her low back just slowly deteriorated over the years. Respondent states the decision should be affirmed, arguing claimant's current need for medical care is due to an intervening aggravation and is not causally related to the 2002 injury.

The only issue for the Board's review is: Is claimant entitled to post award medical care and treatment?

¹ At the time of the hearing, claimant's last name was Fleetwood. P.A.H. at 7.

FINDINGS OF FACT

Claimant injured her back while performing repetitive lifting activities for respondent from March 7, 2002 through June 20, 2002. She was treated by Jacob Amrani, M.D., including undergoing an L5-S1 diskectomy, before being released on November 5, 2002, with no permanent work restrictions.

The case was settled by Agreed Award on May 27, 2003. Under the terms of the Agreed Award, claimant was compensated for a 10% permanent partial general bodily disability for a June 20, 2002 low back injury, with all rights left open, including future medical treatment upon proper application. Claimant worked for respondent until being laid off in November 2003.

Between May 2003 and July 2004, claimant sought treatment for her low back through her primary care physician, Mark Leiker, M.D. Dr. Leiker prescribed muscle relaxers, anti-inflammatories and pain medication.

In July 2004, claimant moved to Hawaii and had perhaps four to seven chiropractic visits for back pain. She testified she was employed by Aloha Machine and Welding for three years as a welder. Her job duties required her to lift up to 50 pounds, bend and twist. After being laid off from Aloha Machine, she went to work as a clerk for the county prosecutor. Claimant denied any back injuries or aggravations while living in Hawaii.

In 2008, claimant returned to Kansas. She worked a temporary job for less than 90 days with DES Staffing as an "artist painter."² Among other things, her job duties required her to lift, bend and twist. Claimant denied any low back injuries while employed at DES Staffing. After that employment ended, she was unemployed until March 2010.

At some time prior to March 2010, claimant was seen by George Watson, D.O., who showed her how to stretch her lower back and prescribed muscle relaxers. She testified she never underwent any diagnostic testing between 2003 and 2010.

In March 2010, claimant began work as an installer for Kuhlmann Installations (Kuhlmann). Her job involved installing school equipment for auditoriums, science labs, gymnasiums (such as bleachers), and class rooms (such as chalkboards). Her job duties required her to lift, walk, bend, twist and assemble parts. At the time she began working for Kuhlmann, claimant indicated she was not under any doctor's restrictions and felt capable of performing any type of work activity. Her back pain in general was 7.5 to 8.5 on a scale of 0 to 10, but she was able to perform physical labor on an eight-hour basis.

² P.A.H. at 12.

In March 2011, claimant sought treatment through Via Christi immediate care clinic because her back pain was worse and went into her left hip, a problem she never had before. She noticed such symptoms when walking. She acknowledged doing a lot of walking at Kuhlmann.³

Following her appointment at Via Christi, claimant sought treatment with Rick Dopps, D.C., who provided adjustments.

On April 13, 2011, claimant was seen by Richa Sharma, M.D., for complaints of lower back pain, radiating into the left groin and lateral aspect of the left lower extremity. Dr. Sharma reported that claimant worked as an installer and was required to lift about 100 pounds, including furniture and metal beams. Dr. Sharma noted:

I talked to [claimant] about the fact that her job may be causing exacerbation of her symptoms. She tells me that she is currently not able to quit her job. She will however try to look for a different one where she does not have to put in so much of manual labor.⁴

Claimant returned to Dr. Sharma on August 3, 2011, complaining of “back pain since February 2011.” Claimant was concerned that something had moved or settled in her low back. Dr. Sharma noted that claimant believed her job, which required a lot of physical work, may be causing an aggravation. Dr. Sharma ordered a lumbar spine x-ray and MRI.

On September 6, 2011, claimant was seen by Dr. Sharma who noted the MRI revealed multilevel degenerative disc disease of the lower lumbar spine, a small L4-L5 disc protrusion or herniation, a diffuse bulge at L5-S1 with degenerative spurring and loss of intravertebral disc height, and multilevel mild neural foraminal narrowing with grade I retrolisthesis of L3-L4. Claimant told Dr. Sharma that she was in a considerable amount of pain and wanted restrictions because her job involved a lot of twisting, turning, bending and repetitive movements, and she did not think she could perform her regular work. Dr. Sharma noted claimant had been set up for epidural steroid injections with a Dr. Rodney Jones. Dr. Sharma imposed a 25 pound weight restriction and recommended claimant avoid repeated bending, twisting or turning movements. Claimant was unable to work for Kuhlmann Installations with these restrictions.

At the parties’ agreement, Judge Barnes issued an Order dated October 27, 2011 authorizing Paul Stein, M.D., to evaluate the claimant and provide opinions regarding causation and treatment recommendations.

³ Claimant’s Depo. at 19-20.

⁴ P.A.H., Resp. Ex. 2 at 2.

On December 20, 2011, claimant was seen by Dr. Stein. Dr. Stein noted that claimant did not require significant medical attention for her low back until 2011, when he believed she suffered a “true aggravation” as a result of heavy work activity, apparently at Kuhlmann. Without regard to causation, Dr. Stein recommended physical therapy, epidural steroid injections, and indicated weight reduction might be of benefit. In addressing causation, Dr. Stein stated:

Although the disk herniation of 2002 predisposed [claimant] to developing degenerative change at L5-S1, I believe that her weight and the more recent, heavy work activity are greater factors in her current symptomatology. The recent work activity particularly was more likely than not a significant aggravation of the lumbosacral degenerative disease which was not very symptomatic prior to that time. In my opinion, the current need for treatment is mostly related to the recent aggravation by her work activity.⁵

On December 27, 2011, claimant was seen at the request of respondent by Matthew Henry, M.D. A review of the MRI revealed some mild degeneration at L4-L5 with some minimal retrolisthesis at L3-L4, with the main issue being degenerative changes, modic endplate changes, and disc collapse at L5-S1. Dr. Henry recommended anti-inflammatories, muscle relaxants, pain medications, physical therapy, and steroid shots. Dr. Henry provided the following opinion:

At this point in time, the L3-L4 and L4-L5 levels are most likely due to chronic degenerative wear and tear; however, the L5-S1 would be a continuation of previous work injury.⁶

However, after reviewing Dr. Stein’s report, Dr. Henry provided a supplemental opinion dated on June 27, 2012, as follows:

I agree with Dr. Stein’s conclusion that the primary pathology is degenerative and her current need for treatment is mostly related to a recent aggravation which was more likely than not caused by her work activity.⁷

The post-award medical hearing occurred on August 28, 2012. Claimant denied any low back injuries or aggravations occurring after she left respondent, including at Kuhlmann. Claimant testified that her low back condition simply steadily declined. As noted above, Judge Barnes issued a post-medical Award on June 27, 2013, finding that claimant failed to meet her burden of proof, and denying claimant’s request for post-award medical treatment.

⁵ *Id.*, Cl. Ex. 1 at 6.

⁶ *Id.*, Cl. Ex. 2.

⁷ *Id.*, Cl. Ex. 3.

PRINCIPLES OF LAW

The burden of proof is on claimant to establish her right to an award of compensation.⁸ Post-award medical treatment can be awarded if the need for medical care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.⁹

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is compensable. In *Jackson*, the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.¹⁰

In *Logsdon*, the Kansas Court of Appeals noted:

1. WORKERS COMPENSATION—*Injury as Direct Result of Primary Injury—Question of Fact*. Whether an injury is a natural and probable result of previous injuries is generally a fact question.
2. SAME—*Injury as Direct Result of Primary Injury—Subsequent Injury Compensable if Primary Injury Arose Out of and In Course of Employment*. When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
3. SAME—*Aggravation of Primary Injury for Which Compensation Awarded—Compensation Allowed for Postaward Medical Benefits*. When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.¹¹

Nance states, "The passage of time in and of itself is not a compensable injury. Thus, where the deterioration would have occurred absent the primary injury, it is not

⁸ K.S.A. 44-501(a).

⁹ K.S.A. 44-510k(a).

¹⁰ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

¹¹ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

compensable. However, where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury.”¹² In *Nance*, “there was undisputed testimony that the primary injury had worsened, quite likely through the normal aging process and the passage of time. The worsening of a claimant's compensable injury, absent any intervening or secondary injury, is a natural consequence that flows from the injury. It is a direct and natural result of a primary injury. Since Nance's worsening back condition is merely a continuation of his original injury, causation is not an issue.”¹³

ANALYSIS

Nance indicates that a worsening of a compensable injury, due to the passage of time and without an intervening accidental injury, is itself a direct and natural result of the injury. Based on the medical evidence, claimant sustained an intervening series of accidental injuries due to her work for Kuhlmann. There is insufficient proof that claimant's current need for medical treatment is necessary to cure or relieve the effects of her 2002 injury. Rather, the need for treatment flows from her subsequent and heavy work for Kuhlmann. The Board does not conclude claimant was injured due to merely walking at Kuhlmann, but rather due to her heavy lifting and repetitive bending, twisting and turning while working for such employer.

CONCLUSIONS

Having reviewed the evidentiary record, the stipulations of the parties and the parties' arguments, the Board affirms Judge Barnes' decision.

AWARD

WHEREFORE, the Board affirms the June 27, 2013 post-medical Award.¹⁴

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

¹² *Nance v. Harvey County*, 263 Kan. 542, 550, 952 P.2d 411 (1997).

¹³ *Nance v. Harvey County*, 23 Kan. App. 2d 899, 909, 937 P.2d 1245, 1252, *aff'd*, 263 Kan. 542, 952 P.2d 411 (1997).

¹⁴ As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal. Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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